United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

ORIGINAL

77-1474

B P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants-Appellants.

DEFENDANT-APPELLANT ERNEST GEORGE TEPPER'S SUPPLEMENTARY APPENDIX

DUDLEY GAFFIN
Attorney for Defendant-Appellant
ERNEST GEORGE TEPPER
233 Broadway
New York, New York 10007
(212) 962-5757

ROBERT B. FISKE, JR.
United States Attorney
Attorney for Appellee
One St. Andrews Plaza
New York, N.Y. 10007

UNITED STATES COURT OF APPEALS
FILED
MAR 3 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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NOTICE OF MOTION FOR SEVERANCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

----------x

Indictment No. 77 Cr. 517

NOTICE OF MOTION FOR SEVERANCE

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Dudley Gaffin, Esq., duly sworn to the 29th day of July, 1977, and all of the proceedings previously had herein, the undersigned will move this Court, before Hon. Charles H. Tenney, a Judge of the Court, at a term for motions to be held at the United States Courthouse, Foley Square, New York, on the 10th day of August, 1977 at 9:30 in the forenoon or as soon thereafter as counsel can be heard, for an order severing Ernest George Tepper from the trial of his co-defendants, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 29, 1977

Yours, etc.

DUDLEY GAFFIN
Attorney for Defendant
Ernest George Tepper
233 Broadway
New York, New York 10007
(212) [redacted]-5757

962

TO: Hon. Robert Fiske, Jr.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Roland Thau, Esq.
Hudson Reed, Esq.

AFFIDAVIT OF DUDLEY GAFFIN IN SUPPORT OF MOTION FOR SEVERANCE
SWORN TO THE 29TH DAY OF JULY, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

Indictment No. 77 Cr. 517

AFFIDAVIT

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DUDLEY GAFFIN, being duly sworn, deposes and says:

I am the attorney for the defendant Ernest George Tepper and as such am fully familiar with the facts and circumstances surrounding this case.

FACTUAL BACKGROUND

Criminal filing 77 Cr. 517 charges the above-named defendants with conspiracy to rob a federally insured bank, i.e., the European-American Bank at 433 Broadway in New York County.

It appears from a perusal of the indictment and the criminal complaint of Special Agent Dale R. Lovin dated July 1, 1977 that the defendants were separately arrested in the vicinity of the European-American Bank. It further appears from a reading of the complaint that either or both co-defendant Caldwell and Bonner made post-arrest, post-conspiracy admissions to the arresting officers, while not in the presence of defendant Tepper,

implicating all three defendants in a conspiracy to rob the bank in question.

THIS MOTION

Defendant Tepper respectfully moves to sever his case from that of his co-defendants on the ground that the post-arrest admissions of his co-defendants are hearsay as to him, and if admitted at a trial of all three defendants, would violate Tepper's Sixth Amendment right of confrontation should, as your deponent currently believes, the confessing co-defendants not take the witness stand. See, Bruton v. United States, 391 U.S. 123 (1968); United States v. Gonzalez and Costano, ___ F.2d ___, slip opn. 3351, 3362-3367 (2d Cir. 1977).

Thus, in order to insure Tepper a fair trial and to insure that his constitutional right of confrontation is not infringed upon, a severance should be granted.

DUDLEY GAFFIN

Sworn to before me this
29th day of July, 1977

ROCHELLE FERBER
Notary Public, State of New York
No. 24-4507879
Qualified in Kings County
Commission Expires [illegible] 79

SA- 5

NOTICE OF MOTION TO SUPPRESS EVIDENCE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

Indictment No. 77 Cr. 517

NOTICE OF MOTION TO SUPPRESS EVIDENCE

----------x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of Dudley Gaffin, attorney for the defendant Tepper, duly sworn to the 29th day of July, 1977, and upon the annexed memorandum of law, the undersigned will move this Court before Hon. Charles H. Tenney, United States District Judge for the Southern District of New York, at 9:30 a.m. on the 10th day of August, 1977, at the United States Courthouse, Foley Square, New York, for an order suppressing from use at trial all evidence seized from the person and/or vehicle of Ernest George Tepper by agents of the F.B.I. or the New York City Police Department, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
July 29, 1977

Yours, etc.

DUDLEY GAFFIN
Attorney for Defendant
Ernest George Tepper
233 Broadway
New York, New York 10007
(212) [redacted]-5757

962

TO: Hon. Robert Fiske, Jr.
United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Hudson Reed, Esq.
Roland Thau, Esq.
c/o Legal Aid Society
Federal Defender Service

AFFIDAVIT OF DUDLEY GAFFIN IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE SWORN TO THE 29TH DAY OF JULY, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

Indictment No. 77 Cr. 517

AFFIDAVIT

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DUDLEY GAFFIN, being duly sworn, deposes and says:

I am the attorney for Ernest George Tepper, one of the defendants charged in indictment number 77 Cr. 517 by a Grand Jury sitting in the Southern District of New York with conspiracy to rob a federally insured bank (18 U.S.C. 371). As such I am fully familiar with the facts and circumstances surrounding this case.

This motion is made to suppress the Government's use at trial of a holster and any other tangible evidence seized from defendant Tepper or from Tepper's automobile on June 30, 1977 in the vicinity of 433 Broadway in New York County.

FACTUAL BACKGROUND

At about 1:00 p.m. on June 30, 1977, the defendant Tepper was seated in his Oldsmobile model automobile in the vicinity of 433 Broadway, after having dropped off two acquaintances,

the co-defendants Caldwell and Bonner, when, without warning or provocation, much less probable cause, Tepper was ordered out from behind the wheel of his automobile.

Tepper was not permitted to re-enter the car, but rather, the agents or officers then proceeded to search his automobile, without his consent, and as a result seized a holster from beneath the passenger seat.

Thereafter the co-defendants Caldwell and Bonner were arrested inside a nearby retail store. Upon information and belief a .22 caliber pistol was seized nearby by the officers who took Caldwell and Bonner into custody.

THIS MOTION

The seizure of tangible evidence from Tepper's vehicle and/or his person, consisting of an empty holster and perhaps other physical items, was improper because the search and seizure of both Tepper and his car was based upon whim and caprice and not upon probable cause necessary to justify a warrantless search of either Tepper's person or his vehicle. Under these circumstances suppression of all such physical evidence, which we believe the prosecution intends to introduce in its direct case, is warranted.

For all of the foregoing reasons, a plenary hearing on defendant's motion to suppress should be held. Should the testimony develop as suggested in this affidavit, then the Court should suppress the physical evidence seized from Tepper's person and

his vehicle on the ground that said evidence was seized in violation of defendant's Fourth Amendment rights.

DUDLEY GAFFIN

Sworn to before me this
29th day of July, 1977

ROCHELLE FERRER
Notary Public, State of New York
No. 24-4807570
Qualified in Kings County
Commission Expires March 30, 1979

DEFENDANT TEPPER'S MEMORANDUM OF
LAW ON THE MOTION TO SUPPRESS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

Indictment No. 77 Cr. 517

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

----------x

DEFENDANT TEPPER'S MEMORANDUM OF
LAW ON THE MOTION TO SUPPRESS

DUDLEY GAFFIN
Attorney for Defendant
Ernest George Tepper
233 Broadway
New York, New York 10007
(212) [redacted]-5757

962

ROGER BENNET ADLER
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

Indictment No. 77 Cr. 517

- against -

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha", a/k/a "Sha", IVAN KEITH BONNER and ERNEST GEORGE TEPPER, a/k/a "Born Freedom",

Defendants.

----------x

PRELIMINARY STATEMENT

Ernest George Tepper moves pursuant to Rules 41(f) and 12 of the Federal Rules of Criminal Procedure to suppress certain oral statements and admissions and tangible physical evidence seized from the person or automobile of defendant Tepper. The relevant facts are set forth in the accompanying notice of motion.

POINT I

DEFENDANT TEPPER HAS STANDING TO MOVE TO SUPPRESS TANGIBLE PHYSICAL EVIDENCE

Under recognized concepts of standing (Brown v. United States, 411 U.S. 223 [1973]; United States v. Tortorello, 533 F.2d 809 [2d Cir.]; United States v. Bannerman, 552 F.2d 61, 63 [2d Cir. 1977]), defendant Tepper has standing to move to suppress evidence seized from his person and his vehicle because in the former situation it is his personal Fourth Amendment right to be free from unreasonable searches and seizures which was violated, and because in the latter, involving the auto search, it was his vehicle which was search immediately after he was ordered out of it. His personal ownership of the premises upon which the search was conducted and his presence at the time the search was conducted provides a clear basis for an assertion of "actual" as opposed to "automotive" standing.

We concede, as we must, that any evidence seized from either of the co-defendants, including, inter alia, a .[illegible]ber pistol, cannot be suppressed upon Tepper's motion. To the extent that the indictment charges a conspiracy (18 U.S.C. 371) which does not require proof of possession at the time of the seizure as an essential and necessary element, Tepper lacks automotive standing to move

to suppress such evidence. In addition, since the right to be free from unreasonable searches and seizures is a personal right, Tepper likewise lacks standing to obtain any relief from violations of Caldwell or Bonner's rights.

POINT II

THE SEIZURE OF EVIDENCE FROM TEPPER'S PERSON AND/OR VEHICLE WAS IN ABSENCE OF PROBABLE CAUSE, IN VIOLATION OF HIS FOURTH AMENDMENT RIGHTS THEREBY REQUIRING SUPPRESSION

It is hornbook law that searches and seizures which are conducted without a warrant, and hence absent judicial supervision, are presumed invalid unless they fall within a clear exception to the warrant requirement.

We believe that the facts at the hearing upon Tepper's motion to suppress will demonstrate Tepper was innocently waiting in his own automobile in the vicinity of 433 Broadway when, without provocation or probable cause, agents of law enforcement began to question Tepper and ultimately ordered him from his vehicle. Immediately thereafter the officers began a search of Tepper's vehicle and seized an empty holster from beneath the passenger seat.

We contend that absent a showing that the police officers had articuable probable cause (Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 [1959]; Brinegar v.

United States, 338 U.S. 160 [1949]) to detain and question Tepper, the search of his person and his vehicle was clearly improper.*

Even assuming arguendo that the testimony at the suppression hearing suggests probable cause or reasonable suspicion (see, People v. Morales, ___ N.Y.2d ___, N.Y.L.J. 7/14/77, p. 1, col. 6; but cf., Davis v. Mississippi, 394 U.S. 721) existed, we contend a warrantless search of the vehicle, at a time when Tepper was already in custody and hence clearly unable to grab for a weapon or destroy evidence in the vehicle, was improper and unlawful. See, Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969). Having secured the vehicle, it was the officers' duty to walk the few city blocks to a nearby courthouse and seek a search warrant for the vehicle. See, United States v. Rodriguez, 532 F.2d 834, 839 (2d Cir. 1976).

The failure to obtain, much less seek, a warrant for the search of the vehicle was a manifest departure from the warrant requirements, as was the extension of the search

*We make these assertions based upon the allegations in the criminal complaint of Special F.B.I. Agent Dale R. Lovin dated July 1, 1977.

Furthermore, it is our belief that the determination to stop and question Tepper was not predicated upon confirmed credible observations of confidential information supplied by a previously reliable informant. Cf., Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959).

to Tepper's vehicle. Under these circumstances, the search of the vehicle was improper and evidence seized therefrom must be suppressed.

CONCLUSION

DEFENDANT TEPPER'S MOTION TO SUPPRESS SHOULD BE GRANTED OR IN THE ALTERNATIVE, A SUPPRESSION HEARING HELD.

Respectfully submitted,

DUDLEY GAFFIN
Attorney for Defendant
Ernest George Tepper

ROGER BENNET ADLER
Of Counsel

Dated: New York, New York
July 19, 1977

:R:ow
-3350

whereas it is actually being given an account whose hearsay nature is concealed. . . ." Id. at 811; United States v. Ramirez, 482 F.2d 807, 811 (2d Cir.), cert. denied sub. nom Gomez v. United States, 414 U.S. 1070 (1973). The minutes of the grand jury proceedings in this case not only demonstrate that the hearsay in the testimony was not concealed, but they also show that Esteppa warnings were given.*

Defendant's challenges to the indictment are are all meritless.

III. Defendant Tepper's Motion to Suppress Evidence Seized At the Time Of His Arrest

While the Government denies that there are any grounds for the motion to suppress any of the evidence in this case, it acknowledge's the defendant's right to and will not oppose his request for a hearing.

IV. Defendant Tepper's Motion For A Severance

The Government does not oppose the defendant's motion for a severance.

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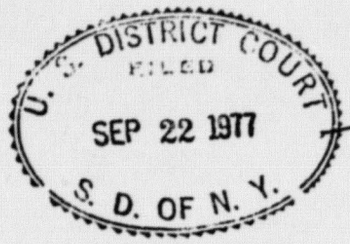
* The Government does not oppose an in camera inspection of the grand jury minutes for the purpose of verifying these assertions.

SA- 17

MEMORANDUM DECISION OF HONORABLE
CHARLES H. TENNEY, DATED SEPTEMBER 20, 1977



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-against- : 77 Cr. 517 (CHT)

#46376

NORMAN STANLEY CALDWELL, a/k/a "Alah Masha," a/k/a "Sha," IVAN KEITH BONNER, and ERNEST GEORGE TEPPER, a/k/a "Born Freedom," :

Defendants. : MEMORANDUM

APPEARANCES

For the Government: ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, N.Y. 10007

By: LEE RICHARDS, ESQ.
DON D. BUCHWALD, ESQ.
Assistant U.S. Attorneys

For defendant Ernest George Tepper:

DUDLEY GAFFIN, ESQ.
233 Broadway
New York, N.Y. 10007

TENNEY, J.

By this motion to suppress, the defendant seeks to have this Court declare inadmissible at trial three items of physical evidence and two statements made by the defendant. For the reasons stated below, the motion is denied in all respects.

The three items of physical evidence are a holster, a

pair of rubber gloves and the defendant's fingerprints, all removed from an automobile in which the defendant was sitting at the time of his arrest. The holster was discovered under the front seat of the car immediately following the placing of handcuffs on the defendant at the scene of his arrest, and the gloves were found on the floor behind the driver's seat a short time later while the vehicle was still at the scene. The fingerprints were taken from items found in the car while it was at FBI headquarters some time after the arrest.

The Court finds first that the police had probable cause to search the automobile, for they had reason to believe that it was being used as part of a bank robbery then in progress. The exigencies of the situation left no time to get a search warrant: the car was on the street, one defendant was in it, two others had been seen getting out and were believed to be armed. Chambers v. Maroney, 399 U.S. 42, 47-48 (1970); Carroll v. United States, 267 U.S. 132 (1925). Furthermore, the Court finds that the search at the scene was incident to a valid arrest. Chimel v. California, 395 U.S. 752 (1969). Thus, the seizure of the holster and the gloves was constitutionally permissible.

With respect to the seizure of the fingerprints, once the law enforcement officials had probable cause to search the car at the scene, and had actually done so, no objection can be made to the further search at the FBI headquarters during

which the fingerprints were taken. Texas v. White, 423 U.S. 67 (1975) (per curiam) (car initially searched at station house at least 30-45 minutes after defendant had been driven there for questioning); Coolidge v. New Hampshire, 403 U.S. 443, 463 n.20 (1971) ("The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station"); Chambers v. Maroney, supra; cf. Cardwell v. Lewis, 417 U.S. 583 (1974) (warrantless seizure of paint scrapings and comparison of tire tread with molds of other tire tracks on day following arrest while vehicle was in police impoundment lot).

The two statements taken from the defendant are likewise admissible. The first--a brief exclamation, repeated two or three times, to the effect that the police had "blown" their case--was made in the car in which the defendant was being transported to the precinct. Although no Miranda warnings had been given, no questions were being asked of the defendant, and he made his statement spontaneously and voluntarily as an interjection into a conversation going on between two officers. Such statements are clearly admissible. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (rule of Miranda directed toward statements stemming from "questioning initiated by law enforcement officers").

Finally, the second statement--given to the FBI during

a formal interview--followed three separate oral readings of the defendant's rights as well as the defendant's own reading and signing of a written statement of those rights. At no time during the FBI interview did the defendant make any request that the questioning cease or that he be permitted to have counsel present. Thus, the defendant must be found to have waived any rights under the fifth and sixth amendments.

The motion to suppress is denied.

So ordered.

Dated: New York, New York

September 20, 1977

CHARLES H. TENNEY

U.S.D.J.

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NOTICE OF APPEAL (TEPPER)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA :

- against - : NOTICE OF APPEAL

ERNEST GEORGE TEPPER, : 77 Cr. 517 (CHT)

Defendant. :

- -X

NOTICE is hereby given that ERNEST GEORGE TEPPER, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 14th day of November, 1977.

Dated: New York, New York
November 21, 1977

Dudley Gaffin

DUDLEY GAFFIN
Attorney for Defendant
Office and Post Office Address
233 Broadway
New York, New York
(212) 962-5757

1 COPY RECEIVED
MAR 3 - 1978
ROBERT B. FISKE, JR.
U. S. ATTORNEY
SO. DIST. OF N. Y.